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No. 983

In the Supreme Court of the United States

OCTOBER TERM, 1959

HAROLD GROSS, A/K/A HARRY GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

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Petitioner, convicted on all counts of a six-count indictment alleging the wilfully attempted evasion of his individual income taxes for the years 1953 through 1958, contended on appeal, *inter alia*, that (1) venue should have been laid in the Eastern District of New York rather than the Southern District of New York; and (2) the trial court committed reversible error in compelling petitioner, during the trial, to answer certain questions put to him on cross-examination. The Second Circuit reversed the conviction on the second ground, and remanded the cause for a new trial. On the venue point, the court held that venue properly lay in the Southern District

of New York, where the indictment was returned and the first trial held. Petitioner seeks certiorari to review that portion of the Second Circuit's decision which relates to venue.

It would seem that the petition for certiorari is premature. The question of venue will be moot unless petitioner is retried and again convicted on the pending indictment, and in that event he could urge the point upon appeal from that conviction. In short, denial of certiorari at this stage would not close the door on petitioner's contention.

The venue argument is, moreover, without substance. The record shows that it was at the office of his accountant in the Southern District of New York that petitioner each year turned over the incomplete—and hence false—information relating to his income, and that it was this conduct on petitioner's part which resulted in the preparation (by the accountant) and the mailing (by petitioner) of the false and fraudulent tax returns understating his net income and tax liability in each of the six years. The proof thus substantiated what the indictment alleged, *viz.*, that one of the means of evasion employed by petitioner was that he had caused false and fraudulent tax returns to be prepared in the Southern District of New York. It is of no consequence that another aspect of the crime, the filing of the returns, involved the Eastern District of New York, where they were received and filed in the office of the Director of Internal Revenue. True, the crime was not completed in the Southern District, but the venue statute (18 U.S.C. 3237) provides that an offense "begun in one

district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Here, as the court below pointed out, it "cannot be said the crime was neither 'begun' nor 'committed in part'" in the Southern District (Pet. 12); hence it constituted one of the two districts in which venue properly lay. Cf. *United States* v. *Johnson*, 323 U.S. 273, 276; *United States* v. *Albanese*, 224 F. 2d 879 (C.A. 2), certiorari denied, 350 U.S. 845; *United States* v. *Miller*, 246 F. 2d 486 (C.A. 2), certiorari denied, 355 U.S. 905.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

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